91-523

Supreme Court, U.S.
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No. 91-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JULIET ELLERY
Petitioner
v.

COUNTY OF SAN DIEGO
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA IN AND
FOR THE FOURTH APPELLATE DISTRICT,
DIVISION ONE

PETITIONER'S BRIEF

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CAL.SUPR.S021120, denied cert.June 26,1991
FOURTH C.A. D012044
SUPER. CT 613788

SUBSTANTIAL FEDERAL QUESTIONS

i. Whether Ellery was deprived of two forums under color of state law.

Subsidiary: Whether the courts violated the separation of powers doctrine and Ellery's due process.

ii. Whether State court had personal and subject matter jurisdiction and Ellery had standing to sue.

iii. Whether a public entity has statutory liability for breach of mandatory duties that injure another.

Subsidiary: Whether injury continues for lack of an injunction.

iv. Whether Ellery's acceptable written words of belief on the first day of work cannot be the "good cause" for firing on the twenty-eighth day.

Subsidiary: Whether County used judicial power to falsely interpret statutes.

Subsidiary: Whether County falsely set aside its merit system.

Subsidiary: Whether Ellery is entitled to truth in records under the Freedom of Information Act [FOIA].

v. Whether Ellery has a right to equal treatment under written contract: its terms, representation and association.

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Judge William C. Pate, Superior Court, granted County demurrer with leave to amend in 10 days, denied Ellery's written request for statement of decision, Aug. 23, 1989.

Judge Jeffrey T. Miller denied Ellery motion for summary judgment, Oct. 5, 1989, denied Ellery's written request for a statement of decision. The court sanctioned Ellery $425 for the motion without stating a reason.

Judge Robert C. Thaxton Jr. granted County second demurrer with leave to amend in 10 days, denied Ellery's written request

for a statement of decision, Oct. 16, 1989.

The court provided an oral statement of decision including the topic "immunity." This was transcribed, mailed to the party and put into the record.

Judge Jeffrey T. Miller granted County third demurrer and dismissed the action, summary judg-ment without trial, Dec. 12, 1989. The court denied Ellery's written request for statement of decision.

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GROUNDS FOR JURISDICTION

The California Supreme Court denied certiorari, June 26, 1991. This Court has jurisdiction to review the case under 28 USC Rule 10.1[c]:

> When a state court ... has decided an important question of federal law ..in a way that conflicts with applicable decisions of this Court.

The important question is whether Ellery is entitled to a forum to litigate her substantive rights. The California appellate court dismissed the case for lack of jurisdiction over "defendant" County and "format" [sic] without giving any statement of rationale or declaration of rights and duties of parties. Therefore no issues were litigated. To comply with the duty to first raise constitutional challenges with the State Attorney General under US Supreme Court Rule 29.4 (c), Ellery served the Attorney General a copy of her California Supreme Court Petition

for Certiorari, on May 17, 1991.

A BRIEF STATEMENT ON JURISDICTION

The trial courts granted County general demurrers without rationales except for Judge Thaxton who stated the demurrer was granted because of County absolute immunity. The appellate court sua sponte determined that no trial court had jurisdiction over the County or the subject matter, wrong "defendant," wrong "format" [sic]. But the appellate court deemed Ellery's pleaded facts to be true. This raises the issue whether a court can dismiss a case for lack of jurisdiction and retain the right to decide whether the facts constitute a prima facie case of breach of duty causing liability. The first court's decision to exercise jurisdiction deprived Ellery of the opportunity to file in federal court.

Ellery filed all required State notices and timely used all State and federal EEOC

remedies. Ellery therefore ripened her right to sue County. The County purposely availed itself of the State limited forum to claim privilege against paying Ellery unemployment benefits, acting under color of state law and meeting the minimum contacts test. The County failed to object to personal jurisdiction, personal service or exhaustion of remedies.

The appellate court sua sponte determined Ellery was suing in the wrong "format" [sic] and was required to seek separate judicial review. But any Superior Court may exercise jursidiction and review any relevant record. The only court to give a rationale was Judge Thaxton, who sustained the demurrer on the basis of County immunity [which was the law prior to 1963]. In summary, the court had personal jurisdiction over the County; Ellery ripened her standing to sue the County; the court was competent to

exercise subject-matter jurisdiction; a defense is not ripe for litigation before a court decides to exercise jurisdiction.

De novo review is appropriate in a contest of two-party First Amendment rights. Both Ellery and the County claim speech and belief privilege. Details were first filed on the initial complaint with County documents attached and they are repeated here to facilitate de novo review.

STATEMENT OF THE CASE

This summary coincides with the words and pages of the California Appellate Opinion of April 8, 1991 [cited as C.A. Op.p.__]. The appellate court deemed Ellery's facts pleaded to be "true" under demurrer rule [C.A. Op. p.9]. The court stated that Ellery argued the same "facts she pleaded three separate times" [C.A. Op. p.12]. Neither County nor court controverts Ellery's pleaded facts.

THE NINE ILLEGAL ACTS OF THE COMPLAINT

01 The COUNTY denied applicant[s] access to posts, 1987-88, exh.6.

02 The COUNTY lied about reasons for firing ELLERY, 1988, exh.3,8.

03 The COUNTY violated Penal Code 11166 in 1988, exh. 3,8.

04 The COUNTY disciplined ELLERY without representation for some reasons, and terminated her for another, exh.4.

05 The COUNTY lied under oath to the STATE to take ELLERY's benefits, exh.2,3,4.

06 The COUNTY lied that Ellery violated the Penal Code, 1988, exh. 2,3,4,8.

07 The COUNTY lied under oath that ELLERY was unqualified, exh. 6,8.

08 The COUNTY ratified its agents' misconduct and recorded and published false information on Ellery. exh.8.

09 The COUNTY violated its regulations and contract duties, 1987-88, to interfere with Ellery's employment, exh.4,6,8.

First, Ellery applied for "certain other positions" in the County in 1987-1988 [C.A.Op.p.4, footnote 1]. The County told applicants in writing to obtain state sanitarian licensing letters and state-certified arrest records BEFORE applying for beginning positions as environmental sanitarian trainee and pharmacy stock clerk. These conditions barred all applicants. The County appointed persons to those positions. Ellery pursued her remedies with County personnel and the Civil Service Commission. The County has more than 5000 employees. Ethel Chastain, Personnel Director, found Ellery "unqualified" before hiring and she documented that later [C.A.Op p.4]:

> Ethel Chastain, Letter to Civil Service Commission, July 12, 1988: Juliet Ellery has tried to "abolish" County "employment standards" in "recent letters." As to her application for "Envir-onmental Health Sanitarian Trainee," it would be "rejected by my department." "She does not

meet the minimum employment qual-ifications." "She has requested a hearing" with you on this.

The full sanitarian position requires "a Bachelor's degree in related field with 30 to 45 units in [science and statistics] and two years training" as trainee. "Trainee" "applicants" must obtain a State "special letter" before applying. We determined Ellery was a "biology teacher" and has an "academic degree.. in Life Sciences."

We talked with her "prior employers" on the telephone to "verify her application." We rejected her application for lack of a State "letter."

We attach a "partial listing of Ms. Ellery's applications" with the County [presumed to be kept in the personnel file under Ellery, see "Avery" C.A.Op.p.5].

Her "complaint should be denied" because she wishes to "abolish" our "employment standards." Chastain letter to Ellery, July 15, 1988: We "rejected" both your employment applications because you lack the "required knowledge and skills for these positions."

The County set aside the civil service merit system, barring Ellery on an academic standard it knew she met. It keeps

these false letters in a file it cannot locate, ["Avery" C.A.Op.p..5,exh. 8].

Ellery was hired and began work "March 25, 1988,"[C.A.Op p.2], to "calculate welfare benefits" with adults. On the first day of work Ellery traded her right to unemployment benefits for County employment. On the first day Ellery made comments on her beliefs on these two forms the County asked her to read and sign:

> Two forms: Penal Code 11166 [child abuse reporting] and Welfare and Institutions Code 15630 [adult abuse reporting]. County addition: --I fully understand the intent of Sec. 11166 and will comply with its provisions. worker signature.
>
> On 11166 Ellery wrote and signed: "I will report bruises and complaints by others. I will not make conclusions." On 15630 Ellery wrote: "If I see bruises or hear complaints I will report that."

Ellery never agreed to "make conclusions" on the "two forms" [C.A.Op p.2]. The County found these "acceptable" on the

first day of work. Later Ellery was disciplined for other reasons without her contract representative present, exh.5. "Twenty-eight days later Ellery was terminated" for her "condition" on the "two forms" [C.A.Op p.2]. Ellery applied for vested unemployment insurance benefits, "approximately $3,600" from a prior employer and County additions [C.A.Op p.3]. The County chose to testify to avoid paying Ellery. No statute requires Ellery to report or to change words or belief.

> The Unemployment Insurance Code 1256 presumes there is no misconduct unless the employer testifies otherwise.
>
> Penal Code 11166.5[a] "This [duty] is <u>not</u> applicable to persons ...[in] child protective agencies [who are] <u>support</u> staff or maintenance staff who do not work with, observe, or have knowledge of children as part of their official <u>duties</u>."
>
> P.C. 11166.5[b] "Non-compliance with Penal Code 11166 is a misdemeanor, punishable by up to six months in jail or by a fine not to exceed [$1000] or both."

County agent Joe Jacquemet gave his sworn statement to the State, exh. 5.

> Joe Jacquemet, May 2,1988: "We agree to pull back the Letter of Warning [of discipline] from your Personnel files since "you were not given time...to seek representation ..." And again, "The letter [of discipline] will be pulled from your Personnel packets."
>
> "Additional issue:. 4/29/88 it came to my attention that the form you signed [Mar.25, 1988] agreeing to abide by 'Child Abuse Reporting' law, had your hand written conditions added to the form." You stated "you had concerns about filing the written report." "One of your concerns relates to liability and vulnerability to law suit."
>
> "San Diego County has interpreted the [Penal Code 11166] law to include ... Maintenance staff. ..and [you must] abide by the law." You must "abide by the reporting law in good faith" to continue your job.
>
> "Addendum: you stated you were not resigning and you preferred to be dismissed." On Termination Action Notice of 5/2-- Jacquemet "recommends.. termination." Jacquemet promised to purge this file, exh.5. County sent letter disclosing "Avery" file to Ellery's address, exh.8.

Dept. of Soc. Services Director Richard Jacobson directs 1500+ personnel. His letter was entered as evidence, exh. 5:

> Richard W. Jacobson, May 10, 1988, letter to Juliet Ellery: Under "Civil Service Rules, you are hereby separated during your probationary period as an Eligibility Technician, effective as of 5:00 p.m., May 2, 1988."
>
> You are "dismissed" because you "failed to satisfy a required condition of employment when you refused on April 29, 1988, to sign the Child Abuse Reporting Agreement without adding modifications and/or conditions."
>
> "All Eligibility Technicians are required to sign this agreement without.. modifications..." the same reason stated by your super-visors."You did not resign" and we now "terminate" you in your "probationary period." "copy to Ethel Chastain and Risk Management."

Two/ thirds of the state CUIAB board upheld the denial of benefits for failure to obey supervisor [Labor Code 2856] which cannot override compliance with written contracts nor state statutes. Officer Berg dissented; she found no duty owed, no

damage to County, and voted to award benefits. "Ellery did not seek [separate] judicial review, nor sue "the State" [C.A. Op pp.3,12]. A CUIAB decision is reviewable by any court. Ellery asked each court to review the CUIAB decision; all refused. The appellate court said judicial review was "mandatory" but refused to judicially review it. Ellery notified County of her claims under the Tort Claims Act of 1963, "Gov. Code sec. 900," for standing to sue the sovereign [C.A.Op p.3], exh.1. Ellery exhausted her remedies with the State "FEHC" and federal "EEOC" and obtained right to sue letters [C.A.Op p.4], exh.7.

Ellery "filed a verified complaint on Judicial Council forms," July 3, 1989, alleging "15" County "tortious acts" of "tort," "negligence" and "fraud" [C.A.Op p.5]. Ellery filed a "Notice of Motion, Judgment on the Pleadings" with the wrong number of Code of Civil Procedure [C.A.Op

p.5]. The court clerk set the hearing on calendar for "October 5, 1989." The court clerk is instructed to give priority to demurrer motions of defendants over motions of plaintiffs. Later County calendared its "demurrer" for August 23, 1989 [C.A.Op p.6]. Judge William C. Pate, Superior Court, granted County demurrer with leave to amend in 10 days and denied Ellery's request for "statement of decision" [C.A.Op p.6], Aug. 23, 1989. All California requests for statements of decision must be written and pose the issues to be decided; the appellate court found Ellery's first request "improper" [C.A.Op p.6]. Judge Jeffrey T. Miller denied Ellery's motion for summary judgment, Oct. 5, 1989, denied Ellery's request for a statement of decision, and sanctioned Ellery "$425" "under CCP Sec. 128.5" without stating a rationale [C.A.Op p.7]. Ellery did not separately appeal any

ruling or "sanction" [C.A.Op. footnote 2]. Ellery asked the appellate court for review of each decision and the sanction. Ellery filed an amended complaint [C.A.Op p.7]. County demurred. Judge Robert C. Thaxton Jr. granted County second demurrer with leave to amend in 10 days, denied Ellery's request for a written statement of decision, Oct 16, 1989, but gave an oral statement ["immunity" C.A.Op p.7]. Judge Thaxton stated:

> Judge Thaxton: Your cause of action for interference with employment access under the Freedom of Information Act.. fails as the County is immune by Gov. Code 818.8 for defamation and misrepresentation.
>
> J. Thaxton: Your causes of action are not really separate, of course there is the government liability.
>
> J. Thaxton: I didn't see abuse of process, deceit and fraud. You have not stated any ulterior purposes, any cause of action theory yet.
>
> J. Thaxton: There is no interference with employment by defamation or fraud.

Ellery: I want to know how to amend the complaint, what things I have to bring out.

Judge Thaxton:--"In the County's materials at page 9, you have to plead fraud specifically. On abuse of process, deceit and fraud, show that defendants willfully acted to use the process.. not proper...for ulterior purposes. Thus fraud fails.

[The County said the complaint had to prove County motive.]

Ellery oral question: Were there sufficient acts in the nine acts for discrimination?

J. Thaxton: I think so... but plead you are a member of a particular class. You ought to plead that. "We people over 40 need our protection in the worst way;"

Ellery: Have I shown the County statutorily breached their duties in those nine acts?

J. Thaxton: There was a mass of material in the nine acts... but I couldn't find a cause of action.

Ellery: Because of the Tort Claims Act of 1963 I have to prove they are statutorily liable for certain duties,.. Have I done that sufficiently?

Court: I don't think you have pleaded it.

> Ellery: Did I have substantial compliance with the Tort Claims Act as in Donahue and Elias?
>
> Court: You have done your work.
>
> Ellery: Did I show proximate cause of the loss of unemployment insurance?
>
> Court: Well, I don't want to get off into other specific matters.
>
> Ellery: I wanted to know how to amend the complaint...
>
> Court: ..I don't want to get back into all of the factual matters because I would have to review those nine acts to give you a complete critique. This is my statement of decision.

Ellery purchased the transcription, served it, and put it into the record. Ellery filed a second amended complaint.

County demurred. Judge Jeffrey T. Miller granted County third demurrer, granted summary judgment to County for "wrongful termination" action without trial, Dec. 12, 1989, and denied Ellery's request for statement of decision. Since the case was never wrongful termination of permanent employment, Ellery motioned for

reconsideration to clarify this one issue. The court denied the request, denied a statement of decision, and denied County requests for "sanctions" [C.A.Op p.8].

The Fourth Appellate District, Division One, affirmed, Apr. 8, 1991, appendix. "Parties to bear own costs on appeal" shows no sanction against Ellery for bringing suit, although the court found the case should have been "dismissed" from the "initial complaint" [C.A.Op pp.13,12]. The court discarded the County "eight" grounds, set aside all "Ellery's contentions" and "limited" itself to review of jurisdiction to award damages [C.A.Op pp.6,9]. The court stated the trial court had no jurisdiction over the "defendant" or the "format" for the "relief" sought, the wrong party and the wrong court for subject-matter [C.A.Op p.12]. The court dismissed all nine factual claims without a rational and

failed to review fairness of prior decisions or sanction. It found all court errors non-"prejudicial" [C.A. Op. pp. 9, 11] for lack of jurisdiction [C.A. Op. p. 12]. The California Supreme Court denied review, Jun. 26, 1991.

CONCISE STATEMENT OF FACTS AND REASONS TO GRANT REVIEW, Rule 14 [g]

i. Whether Ellery was deprived of two forums under color of state law.

Subsidiary: Whether the courts violated the separation of powers doctrine and Ellery's due process.

Ellery was deprived of a forum to put the County on trial for its illegal acts that damaged Ellery. Thus reversal of the grant of summary judgment to the County is just and does not subject the County to double jeopardy. When the appellate court affirmed summary judgment for the County, it did so on the basis of no jurisdiction over the County and subject matter. It withheld due process litiga-

tion of Ellery's rights in a court of law. State presumption statutes on evidence, jurisdiction and final judgment permit courts to make this error that an executive branch remedy replaces a right to civil action. Ellery notified the State Attorney General's Office of these unconstitutional presumptions prior to this petition.

Ellery met all the jurisdictional requirements for ripening her civil action. County false statements could not have been litigated while it had sovereign immunity. There is no dispute of facts as to those false statements. Ellery filed the proper notices and pursued all administrative remedies. Her right to a civil action has ripened. It is time to hold the County liable for its torts.

ii. Whether State court had personal and subject matter jurisdiction and Ellery had standing to sue.

From the initial complaint, the court

had personal and subject matter jurisdiction and Ellery had standing to sue. The County purposefully availed itself of a State administrative forum; it made a general appearance in the civil case and failed to deny jurisdiction. Ellery's standing was based on injury caused by illegal acts of the County. She perfected her claim by meeting the statute of limitations, serving Tort Claims Act notice on the sovereign and exhausting administrative remedies. The notice gave the County another chance to settle.

> iii. Whether a public entity has statutory liability for breach of mandatory duties that injure another.
>
> Subsidiary: Whether injury continues for lack of an injunction.

California gave parties the right to sue public entities for statutory liability under the California Tort Claims Act of 1963. Ellery met all the jurisdictional requirements, infra. Judge

Thaxton was aware of statutory liability when he granted the County demurrer; see statements supra. Judge Miller ruled on two motions; he was aware of statutory liability because he edits the Continuing Education of the Bar publication on government tort claims liability. These facts as to court knowledge were incorporated into Ellery's appeal. State public entities have statutory liability for acts which breach mandatory duties and cause damage. But sovereign privilege and immunity still prevail during administrative process. Ellery raised County false statements during that process but to no avail, apparent on documents filed with the complaint.

Statutory liability requires a specific complaint, as was Ellery's initial complaint, supported by County and State documents. County demurrers admitted the facts of statutory liability. First Amend

-ment rights and derivative torts were pleaded with specificity, which meets the State test for a 42 USC sec. 1983 complaint. One court claimed it would not grant trial until the County discrimination motive was proved, infra, Judge Thaxton. But illegal conduct speaks for itself under statutory liability. As a matter of law, Ellery is entitled to summary judgment on her pleadings, damages and an injunction to stop further County torts.

iv. Whether Ellery's acceptable written words of belief on the first day of work cannot be the "good cause" for firing on the twenty-eighth day.

Subsidiary: Whether County used judicial power to falsely interpret statutes.

Subsidiary: Whether County falsely set aside its merit system.

Subsidiary: Whether Ellery is entitled to truth in records under the Freedom of Information Act [FOIA].

The County accepted Ellery's words of

belief on the first day. Later her supervisor declared that Ellery's belief would terminate her employment. Later the director of 1500 employees ratified that decision to fire Ellery because of County belief and "interpretation" that Ellery violated her mandatory duty under Penal Code 11166. Later the director of all employees, Ethel Chastain, ratified the acts and words of other County agents. Director Chastain claimed that Ellery was unqualified to apply for County jobs. Chastain claimed Ellery's ideas, speech and opinion were "attempts to abolish County standards" and therefore the Civil Service Commission should deny Ellery's claims to apply for employment.

Ellery is the privilege holder of her personnel records under the Freedom of Information Act. FOIA does not give the County any privilege for perjury, defamation, false light or interference with

access to employment. But the County keeps false facts about Ellery in its records. FOIA protects Ellery's right to examine such records for accuracy. FOIA gives Ellery the right to enforce truth in these records. Ellery had a duty to fill out County forms truthfully on her first workday. Ellery had no duty to "obey her supervisor" by "changing her statement of beliefs" or be fired on the twenty-eighth day. The County waived its right to fire Ellery for her written words of belief after it accepted those words on the first day. Only after it fired Ellery did it interpret the Penal Code to fire Ellery for misconduct. Only after it denied her access to jobs did it claim Ellery's beliefs were interfering in County "standards." Only after it put derogatory material in her personnel file did the County claim it could not locate the file, but only the "Avery" file.

v. Whether Ellery has a right to equal treatment under written contract: its terms, representation and association.

The County perjured itself [a] on the contract terms when it fired Ellery for "misconduct" under California Penal Code 11166. This perjury [b] enabled County fraud, taking vested benefits and sanctions of $425. The County [c] ratified its management agents' acts and benefited from those acts. The County [d] failed to permit Ellery union association and representation during discipline, a right under the written contract. The County [e] promised in writing to purge the disciplinary notices from the record but later refused to do so. The County [f] testified that the oral demands of supervisors superceded the written contract. The County [g] prevented merit competition for jobs and prevented access to apply for employment. It discriminated with public funds.

Last, this is an ideal dispute for summary disposition by the Court. There are no facts in dispute. Only legal questions remain. Summary judgment for the County may be reversed. When Ellery moved for summary judgment for her case, she was sanctioned $425, but the County had fair opportunity to defend. Summary Judgment for Ellery may be awarded de novo based on County statements included in this petition. The County would then pay Ellery $4000 in benefits, plus a return of the $425 sanction, and pay Ellery's legal expenses, about $7000 for computer, copying, filing, and service fees. The County could be enjoined to make an affidavit that it has purged Ellery's personnel records and now discloses the exact contents of a truthful record and agrees not to publish any further false statements on Ellery. Originally Ellery asked that the County be penalized $5000

to be paid to the Public Defenders office for the use of County employees in disputes with the County. Such a minor penalty would benefit taxpayers by inducing County agents to follow County rules and State law. This question could be determined de novo or remanded to the State.

ARGUMENT

1. Ellery was deprived of concurrent forums under color of state law.

> 42 USC sec. 1983, enacted 1871. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

After exhaustion of administrative remedies, Ellery's right to a civil action in federal or state court ripened. 42 sec. 1983 is a remedy for "official violation of federally protected rights,"

Dennis v. Higgins, 111 S Ct 865, 869, 870 [Feb.2.91]. One can sue for "injunctive and declaratory relief" [p.869] "under the Constitution and laws" [p.870]. Concurrent jurisdiction provides a choice of forum with the same rules of timeliness and burden of proof. This avoids forum shopping. Because the State initially took jurisdiction and then dismissed the case, it caused Ellery to lose her right to the federal forum under color of state law, as in

> Howlett by and through Howlett v. Rose. 110 S Ct 2435,2438 [Jun.11.90]. Howlett was a unanimous decision under the Supremacy Clause, art.VI, clause 2, "federal law is enforceable in state courts" when state law waives sovereign immunity.

i. Subsidiary: the courts violated the separation of powers doctrine.

The courts ratified the County's breach of the separation of powers doctrine. During the limited executive branch hearings the County made these violations:

[1] The County vetoed County Civil Service Commission oversight review of Ellery's complaint. This interferes with the County's own checks and balances. The County falsely stated to the Commission that Ellery was attempting to "abolish" the merit system, whereas the County was abolishing fair access to jobs. The executive branch can veto laws or rules, but not oversight review of disputes,

> Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc, 111 S Ct 2298 [Jun.17.91] [veto].

[2] The County interpreted a statute, Penal Code 11166, to create a new duty for clerk Ellery to investigate child abuse. The County has no authority to interpret a statute contrary to its plain meaning, or interpret a law contrary to general law. The County has no authority to make a rule that has no rational basis, as in

> Arcadia Ohio v. Ohio Power Co., 111 S Ct 415 [Nov.27.90] [plain meaning],

Cottage Savings Association v. Commissioner of Internal Revenue, 111 Ct. 1503 [Apr.17.91] [rationale]

City of Columbia v. Omni Outdoor Advertising Inc, 111 A Ct 1344, 1348 [Apr.1.91] [rationale].

[3] The sovereign County had three early opportunities to end the dispute without litigation, with notice from EEOC, State FEHC, and Tort Claims Act Notice. Instead it falsely stated to the courts that the right-to-sue letters from EEOC and FEHC supported the County's "rejec- tion" of Ellery's claims. Right-to- sue letters are not judgments on the merits,

Groves & UAW v. Ring Screws Works.., 111 S Ct 498 [Dec.10.90]. [letter]

Stevens v. Dept of Treasury, 111 S Ct 1561 [Apr.24.91]. [letter]

i. Statutory presumptions cancel the balance of power and Ellery's right to due process action.

California statutory presumptions deny the victim a day in court, after the public entity's illegal acts injure her.

[1] One set of statutes state that judicial power is a court function.

[2] A second set of statutes permit agencies and the County to interpret the law while immune from court jurisdiction.

[3] A third set of statutes permit the courts to presume an administrative remedy is preemptive and exclusive.

> Cal.Evidence Code 639: A judgment ..is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined.
>
> Ev.Code 639 violates due process by denying the use of evidentiary factual findings at a second proceeding for judicial economy, Dowling v. US, 110 S Ct 668 [Jan.10.90], and
>
> Lytle v. Household Mfg.Inc, 110 S Ct 1331 [Mar.20.90], referring to Parklane securities [p. 1334, 1336]; summary judgment may rely on factual issues determined in a prior case.

[3] The third set of statutes require the victim's attorney to challenge sovereign immunity and court presumptions and request statements of findings and clarifi-

cations of ambiguities to preserve an issue for appeal. Thus the attorney must risk sanctions for impertinence or waive the right to appeal. In the instant case, the County repeatedly requested sanctions against Ellery.

"A fair trial in a fair tribunal is a basic requirement of due process," Robertson v. California, 111 S Ct 568, 569 [Dec.3.90]. "The touchstone of due process is protection of the individual vs. arbitrary action of the government," Dent v. West Virginia, 129 US 114 [1889].

ii. The State court had personal jurisdiction over the County.

The State court had jurisdiction over the sovereign County after Ellery was injured and exhausted her administrative remedies, which ripened Ellery's standing to sue. Ellery's notices complied with the EEOC and State FEHC requirements,

"State administrative procedures do not foreclose resort to sec.1983," in

Patsy v. Bd of Regents of Florida, 457 US 496, 516, 102 S Ct. 2557, 2568 [1982], in Wilder v. Virginia Hosp Assn, 110 S Ct 2510,2524 [Jun.14.90].

A court may not be divested of jurisdiction if it had jurisdiction over the parties at the outset:

Freeport- McMoran Inc. v. KN Energy, Inc, 111 S Ct 858 [Feb.19.91]: Standing is determined at time action is filed, not subject to later divestment.

Due process notice assures jurisdiction over the party,

Burnham v. Sup Ct, Marin Co, California, 110 S Ct 2105 [May 29.90].

ii. The State court had subject matter jurisdiction.

Administrative hearings are limited, Warth v. Seldin, 422 US 490 [1975], and the public entity retains its sovereign immunity. Thus an administrative hearing is preliminary to civil remedy and may stop further injury. The executive branch remedy cannot substitute for a judicial remedy [Cage, Ford], nor can a party

waive a judicial forum [Gilmer].

Cage v. Louisiana, 111 S Ct 328 [Nov.13.90].

Ford v. Georgia, 111 S Ct 840 [Feb.19.91].

Gilmer v. Interstate/ Johnson Lane Corp, 111 S Ct 1647,1651 [May.5.91].

The State court had jurisdiction for 42 USC sec. 1983 claims and for statutory liability of the sovereign County, as in Dennis, supra.

ii. Ellery had standing to sue.

One must be injured and file any required notices and exhaust remedies before the right to sue ripens. Earlier, Ellery had no standing to put the County on trial; the County had sovereign immunity during the administrative hearing.

Air Courier Conference of America v. Amer. Postal Workers Union, 111 S Ct 913 [Feb.26.91] Rehnquist opinion for the court; postal employees have no substantial interest, no standing, but competitors of regulated entities do.

The original plaintiffs lacked standing to sue but were injured later by

the state court judgment in: US Dept. of Labor v. Triplett, 110 S Ct 1428, 1435 [Mar.27.90].

Keller v. State Bar of California, 110 S Ct 2228, 2233 [Jun.14.90]. Unanimous. Standing to challenge the Committee of State Bar Examiners rule of "compulsory" "duty to pay dues" which support politics is subject to US Supreme Court review.

iii. A public entity has statutory liability for breach of mandatory duties that injure another.

A public entity must expressly give up its sovereign immunity, Blatchford. California public entities have specific statutory liability.

Blatchford [commissioner in Alaska] v. Native Village of Noatak and Circle Village, 111 S Ct 2578, 2581 [Jun.24.91].

These legal duties must be litigated in a court. Judge Thaxton, noted that statutory liability applied in this case, cited supra. When a public official infringes on private rights, the case must be tried on the facts, Barry, or a court may review the legal "duties," Keller, supra.

Barry v. Edmunds 116 US 550, 565 [Feb.1,1886]. "In no case is it permissible for the court to substitute itself for the jury" or compel "its own view of the facts" as the "standard and measure of justice."

Summary judgment avoids trial on statutory liability. It is not fair unless the legal questions are determined, and a trial on the facts would do more injury than it could cure. A prima facie case of perjury, fraud, defamation [Anderson] or discrimination should plead with specificity to avoid damaging parties by the "cure."

Anderson v. Liberty Lobby, Inc., 106 S Ct 2505 [1986]: Plaintiff must demonstrate defamation at the outset.

The elements of proof for statutory liability are [A] Acts [conduct] which [B] Breach an express duty and [C] Cause [D] Damage or injury to another. This parallels "prohibited conduct causing another's injury " of Warth v. Seldin, supra. "Proximate cause" is a factual question,

and Ellery argued before J. Thaxton that the County proximately caused her damage, supra. Probable cause is a legal question. The County had no probable cause to fire Ellery because Ellery had no duty under Penal Code 11166. The County violated its mandatory statutory duty under P.C. 11166, its duty to investigate child abuse cases with experts, a misdemeanor. Only a court can define terms of a statute, but the County redefined P.C. 11166. Only a court determines questions of legal right, duty or definition, such as "seaman" in McDermott, and cannot delegate this duty to the County.

McDermott International Inc. v. Wilander, 111 S Ct 807 [Feb.19.91].

Only a court determines whether the right is an old or new right, or retroactive, in

Butler v. McKellar, 110 S Ct 1212 [Mar.5.90], Ashland Oil Inc. v. Caryl [tax commissioner West Virg.], 110 S Ct 3202 [Jun.28.90].

Courts must state legal findings,

Cottage, supra, and
Citibank v. Wells Fargo Asia Ltd,110 S Ct 2034 [May 29.90], and

FirsTier Mortgage Co. v.Investors Mort.Ins.Co, 111 S Ct 648 [Jan.15.91]

Thus only a court can determine a sovereign's statutory duty. A sovereign cannot win the case on immunity, Cohens v. Virginia, 6 Wheat 264 [1821].

iii. Subsidiary: Injury continues for lack of an injunction.

Ellery pleaded the facts and statutes specifically and raised all these legal questions. The courts did not litigate facts and issues or make findings. The injury continues until the County is enjoined to stop interfering with Ellery's employment reputation and access, and enjoined to purge and disclose the personnel record to Ellery. Lytle made equitable discrimination claims, was denied relief and the employer continued to damage his access to employment:

Lytle, supra.

iv. Ellery's acceptable written words of belief on the first day of work cannot be the "good cause" for firing on the twenty-eighth day.

Ellery's written words did not violate any rule or statute nor subject the County to any risk of harm. County knowing acceptance of those words, waived its right to later reject them. Estoppel may provide relief in First Amendment cases, in Cohen 1991. Ellery's words were not the proximate cause of termination. The County used Ellery's speech as a pretext for firing her for misconduct of "duty."

Cohen v. Cowles Media Co, 111 S Ct 2513 [Jun.24.91].
Cohen v. California, 403 US 15 [1971].

Oral, written and symbolic words are equally protected: Cohen 1971: "There is no bright line between manner and content of communication." Both Ellery and the County claim First Amendment privilege

for words and belief. The County claims privilege to interpret statutes as to its duties and Ellery's duties. All social service departments must research their statutory duties, so that they use but do not overstep their authority, as in

> DeShaney v. Winnegabo Co [Dept Soc. Serv] 109 S Ct 998, 1003 [1989]. The DSS had no duty to protect the child outside its custody from a parent,and
>
> Bowen [fed. DHHS] v. Kizer [Cal.DHS] 485 US__, 108 S Ct__ [Mar.23.88].The agent has the authority to read federal and state law and conform his department conduct to both laws.

Question--when are false words conduct with liability? Statutory liability is based on false, intentional, knowing words that cause ascertainable damage, or falsify records, or misconduct that restricts another's speech, under the Freedom of Information Act of 1974 and the California Information Practices Act of 1977. Some examples are found in Forrester, Siegert, Rutan, Rankin, Renee,

Tarkanian, Office Personnel Management, Rust v. Sullivan, and Demarest. A public employer has no duty to provide a public forum, Kokinda.

Forrester v. White 108 S Ct 538, 484 US__, [Feb.12.88]. The judge claimed judicial privilege to discriminate with employees.

Siegert v. Gilley, 111 S Ct 1789 [May 23.91]. Government agent evaluated Dr. Siegert in writing and that writing was used to limit his license to practice psychotherapy. Siegert must prove the prima facie case first.

Rutan v.Republican Party [Delaware], 110 S Ct 2729 [Jun.21.90]. Clerk fired for political party choice.

Rankin v. McPherson 483 US __, 107 S Ct__ [Jun.24.87]. Low-level employee made comment only to co-worker on assasination of the President.

Renee, City of San Francisco v. Geary [party members], 111 S Ct 2331, 2336-7 [Jun.17.91]: Ballot speech restriction: "We have permitted First Amendment Claims [even] by those who ... wanted to challenge a restriction on speech they desired to hear," but a claim must be ripe.

Tarkanian, Nat'l Colleg. Athletic Assoc. v. Tarkanian 488 US__109 S Ct 454 [1988]. Public university uses NCAA written letter to fire coach.

Office Personnel Management v. Richmond, 110 S Ct 2465 [Jun.11.90]. The government agent reassures a disabled party of benefits under the "words" of the rule, but the newest publication changes that rule, so party loses benefits.

Rust v. Sullivan, 111 S Ct 1759 [May 23.91]. The government agent construes the law to prevent speech on abortion. [dissent of J. O'Connor].

Demarest v. Manspeaker, 111 S Ct 599 [1/8/91]. The government argues that subpenas for witnesses from jail and subpenas for witnesses not in jail have different titles, to avoid paying for prisoners to witness.

US v. Kokinda, 110 S Ct 3115 [Jun.27.90].

County false words were knowingly false and caused all Ellery's damage, excluded her from 5000+ County jobs and from civil service commission review of Bonafide Occupational Qualifications, and today interferes with her access to employment.

iv. Subsidiary: the County used judicial power to falsely interpret statutes.

Only a court can exercise judicial pow-

er, to give opinions on legal duties or privileges. Fact-finders determine facts of conduct, Barry, supra. The County decided it was judge and jury on Ellery's duty and conduct. Agents can determine how to conform their conduct to the legal duty, Bowen, supra. Agents cannot determine privileges or immunities, nor claim judicial privilege to discriminate on employment, Forrester, supra. The County knowingly reversed its penal code statutory duties with Ellery; it knew it is a mandatory reporter with full immunity for child abuse reporting. It knew clerk Ellery was NOT a reporter and not immune. It made false claims to take Ellery's benefits. It made further false claims to exclude her from job access and access to Civil Service Review of Bonafide Occupational Qualifications.

> If vague, a statute should be void, not cured by layperson construction, Gozlon v.US,111 S Ct 840,849 [Feb.19.91].

iv. Subsidiary: the County falsely set aside its merit system.

The County testified falsely to the County Civil Service Commission that Ellery was trying to "abolish" the County merit employment system. But Ellery challenged the County's voiding of its own merit system. A public entity must create a merit system of Bonafide Occupational Qualifications [BFOQ] on a rationale basis, following its own established due process rules, in Columbia 1991, supra. It has no privilege to make political appointments to low positions, in Rutan 1990, supra. Arbitrary appointment is discrimination per se. A merit system may have an age of retirement, in Gregory, infra. A public entity can't make and break rules capriciously or discipline or fire on the basis of speech or opinion, Tarkanian 1988, supra.

Gregory v. Ashcroft 111 S Ct 2395 [Jun.20.91].

iv. Subsidiary: Ellery is entitled to truth in records under the Freedom of Information Act [FOIA].

The Freedom of Information Act of 1974 is a privilege assuring the right to discover public government information [hear-ing aid testing], public court and property records, and to discover confidential information kept on oneself. The landmark case was,

> Lone Steer Inc., Donavan v. 464 US 408, [1984].

In Cohen v. Cowles 1991, supra, the publishers guaranteed confidentiality of a source and broke that promise. Knowing use of false words is not protected,

> Anderson v. Liberty Lobby, Inc., 106 S Ct 2505 [1986]. On First Amendment rights, when no weighing of evidence is necessary, and all elements required for summary judgment are present, it is granted. [part IIA-B].

This protection is the substantive right to enforce truth in records, under 42 USC. sec. 1983, and other remedies. California adopted a parallel law in 1977.

First Amendment freedoms have limits. They are rights and liabilities for truth, and under FOIA, confidentiality and truth. Some unique personal speech can be copyrighted, Feist, Business, Stewart, unless it defames, Anderson 1986, supra.

> Feist Publicatins Inc. v. Rural Telephone Service Co Inc __US__ 111 S Ct __ [Mar.27.91].
>
> Business Guides Inc. v. Chromatic Communiations, 111 S Ct 922 [Feb.26.91].
>
> Stewart v. Abend, 110 S Ct 1750 [Apr.20.90].

No privilege or copyright stops access to public and government records on oneself, since records have been tested for truth. Mere allegations of child abuse or other wrong -doing would not be a public record until litigated. The County has a duty to test allegations for truth before placing them into the personnel record. Ellery can enforce that right under FOIA. Yankee ingenuity can be protected by law,

but not defamation. Truthful information, speech, and beliefs make democracy possible and are protected:

Milkovitch v. Lorain Journal, 110 S Ct 2695 [Ohio, Jun. 21.90] 110 S Ct 2695. [newspaper called him a liar]

Masson v. New Yorker Magazine Inc [Knopf and Janet Malcolm], 111 S Ct 2419 [Jun. 20.91]. [reckless]

Ohio Civil Rights Commission v. Dayton Christian Schools Inc. 477 US 619 [Jun.27.86]. [fired for beliefs]

Gentile v. St Bar of Nevada 111 S Ct 2720, 2731, 2734, [Jun.27.91]. [disciplined for speech]

v. Ellery has a right to equal treatment under the written contract terms.

The County operated outside the contract and disciplined Ellery for unique duties not required of others. This violated the equal protection clause. A rule must apply to all: state rule of retirement age does not violate equal protection, using the rational basis test, in

Gregory v. Ashcroft, 111 S Ct 2395 [Jun.20.91].

v. Ellery has a right to equal treatment and representation under the written contract.

The County operated outside the contract and denied Ellery fair right of representation and notice before discipline, as required under the contract,

Coppage v. Kansas, 236 US 2 [1915]: Labor without representation is involuntary servitude.

With prior notice required by contract, Ellery would have had the option for representation, instead of surprise discipline. Associations have representative negotiation options in Airline.

Airline Pilots Assoc. Interna't v. O'Neill, 111 S Ct 1127 [Mar.19.91].

Fort Stewart Schools v. Fed Labor Relations Authority, 110 S Ct 2043 [May.29.90]. The employer must negotiate to make a contract and abide by its terms.

Fair representation is the issue in Fort and the issue for attorneys, in Gentile.

Gentile v. St Bar of Nevada 111 S Ct 2720, 2731, 2734, [Jun.27.91]. [no "material prejudice" to the client]

/ / /

v. Ellery has a right to equal treatment and right to associate under the written contract.

An association or entity cannot interfere with the member's right to associate or speak, or charge dues for lobbying.

Keller v. State Bar of California, 110 S Ct 2228 [Jun.14.90], and

Lehnert v. Ferris Faculty Assn, 111 S Ct 1950 [May 30.91].

Each collective bargaining agreement worker has the right to associate with others to contract, Coppage, Airline Pilots, Fort, Lehnert, supra. Due process assures the equal protection of rights.

Justice O'Connor dissent in Pacific-Mutual Life Insurance Co. v. Haslip, 111 S Ct 1032, 1058 [Mar.4.91]: "A process that yields unfair and inconsistent results in many instances violates due process in every case."

CONCLUSION

For all the foregoing reasons, Ellery requests summary disposition of the case. The County is the sole other party. The State Attorney General is served under:

> Rule 29.4 (c) "In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn into question, and the State or any agency, officer, or employee thereof is not a party,.. ..the initial pleading ..filed in this Court shall recite that 28 USC sec. 2403(b) may be applicable and shall be served upon the attorney general of that State. ..The initial pleading..shall state whether or not [a State court examined the issue]."

The State courts have had full opportunity to examine these issues and have chosen not to exercise jurisdiction.

CERTIFICATION -- I declare under penalty of perjury under the laws of the United States of America that this is true and correct and consistent with current law.

September 22, 1991 Juliet Ellery
Juliet Ellery

Fourth Appellate District, Division One,
No. D012044, S021120

Supreme Court filed Jun 26, 1991,
Robert Woodruff Clerk, Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

JULIET ELLERY, Appellant
v.

COUNTY OF SAN DIEGO, Respondent

Appellant's petition for review DENIED.

Arabian

Acting Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL, FOURTH APPELLATE
DISTRICT, DIVISION ONE
STATE OF CALIFORNIA

JULIET ELLERY, Plaintiff & Appellant, v. COUNTY OF SAN DIEGO, Defendant & Respondent)	Filed APR 8, 1991 Ct.App. No.D012044 Sup. Ct.No 613788

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey T. Miller, Judge. Affirmed.

Plaintiff and appellant Juliet Ellery (Ellery) appeals the dismissal of her action against the County of San Diego (County) after the trial court sustained County's demurrer to Ellery's second amended complaint without leave to amend and denied Ellery's motion for reconsideration. We agree with Ellery the trial court (Judge William C. Pate) erred in failing to state the specific ground or grounds for sustaining County's demurrer to Ellery's initial complaint. However,

Ellery was not prejudiced by this error because none of her three complaints stated sufficient facts to constitute any viable cause of action against County for the remedy she sought. Therefore, we affirm the dismissal.

FACTS

On March 25, 1988, Ellery was hired by County to calculate welfare benefits as an Eligibility Technician. On the day she was hired Ellery signed two forms agreeing to report abuse of children and/or dependent adults. However, on both forms Ellery added that she would not make conclusions. Apparently these forms were reviewed by Ellery's supervisors on that date and found acceptable. Twenty-eight days later Ellery was terminated from County employment when she refused to unconditionally sign both forms.

At the time Ellery was hired by County

she was receiving unemployment insurance benefits with approximately $3,600 remaining. After she was terminated by County, Ellery made an application for unemployment benefits, which was denied. This denial was upheld by the California Unemployment Insurance Appeals Board (CUIAB) on September 27, 1988. The ground for the finding Ellery was not terminated by County was that she had been discharged for "misconduct." According to the CUIAB majority opinion Ellery's misconduct was her refusal to unconditionally sign the two forms.

PROCEDURE

Ellery did not seek judicial review of the CUIAB's decision. Instead, Ellery filed a claim with County under Government Code section 900 et seq. Her claim, dated November 23, 1988, set forth detailed facts as well as her requested relief. On

December 12, County caused a notice of insufficient claim to be sent to Ellery asserting her claim needed a specific date, footnote 1. Ellery did not respond, and on January 4, 1989, County rejected her claim for her failure to "correct the insufficiency."

Ellery also charged County with age discrimination; her complaint was referred to the California Department of Fair Employment and Housing (Department) by the federal Equal Employment Opportunity Commission for filing. However, Department rejected Ellery's age discrimination complaint on June 27, 1989. Finally, Ellery requested copies of her personnel records from County. Her request

Footnote 1: Ellery's claim contains three dates: (1) the date of the letter terminating her from County employment; (2) the date of the CUIAB's decision; and (3) the date of a letter from Chaistain of County's Personnel Department stating Ellery was not qualified for certain other positions.

was denied because apparently County filed Ellery's file under the name "Avery" and could not locate the documents.

On July 3, 1989, Ellery filed a verified complaint on Judicial Council forms alleging three causes of action. Ellery's first cause of action sounded in intentional tort and contained 15 separate alleged tortious acts. Her second and third causes of action sounded in negligence and fraud. Ellery prayed for her unemployment benefits and a small amount of punitive damages to be placed in a fund to assist others injured by County. Ellery then filed a document entitled, "Notice of Motion, Judgment on the Pleadings, CCPS 637c." The title is incorrect; Ellery's motion was for summary judgment under Code of Civil Procedure section 437c. Her motion was set for hearing on October 5,1989

However, County filed a demurrer to

Ellery's complaint, which was set for hear-ing on August 23. There are eight separate grounds argued in the demurrer. Judge William C. Pate sustained County's demurrer with 10 days leave to amend. The record does not reflect which, if any, of the eight grounds formed the basis of the court's ruling. The August 23 minute order states: "Demurrer sustained; 10 days leave to amend." Ellery improperly requested a statement of decision submitting a proposed statement to the trial court with various boxes to be marked. From the absence of an order in this record, we assume the trial court did not respond to Ellery's request for a statement of decision.

On August 25, Ellery filed a first amended complaint with four causes of action. Ellery now added a cause of action for age discrimination. In the

caption of her first amended complaint, Ellery noted the October 5 hearing date for her summary judgment motion. Despite County's demand to Ellery that she remove the motion from the calendar, the hearing went forward. Ellery's motion was denied by Judge Miller and she was sanctioned $425 by the trial court "under CCP sec. 128.5," footnote 2. County again successfully demurred to Ellery's first amended complaint. This time, Ellery tells us, the third trial judge (Judge Thaxton) orally gave her reasons for sustaining without leave to amend County's demurrer to three of her causes of action stating the County was immune. However, the trial court granted Ellery leave to amend her cause of action for age discrimination.

Once again, Ellery amended her complaint, filing a second amended complaint

Footnote 2: Ellery has not appealed the trial court's order sanctioning her $425.

for employment discrimination on October 25. County successfully demurred because there are no facts supporting a cause of action for age discrimination. This time Ellery's complaint was ordered dismissed after the court sustained County's demurrer without leave to amend. Ellery's request for reconsideration was denied, as was County's request for sanctions. Ellery timely appeals from the order of dismissal served on her by County, footnote 3.

Ellery asserts (1) three trial courts erred in sustaining demurrers to her complaints without reasons; (2) the trial court which denied her motion for summary judgment and sanctioned her $425 failed to comply with Code of Civil Procedure section 437c because it did so "without a

Footnote 3: We assume County's order of dismissal is in error when it refers to the dismissal of the cross-defendant since there is no cross-complaint in this record.

rationale"; and (3) County prevailed before the CUIAB without giving Ellery a trial.

County (sic) limits its response to whether Ellery's second amended complaint stated or could state a cause of action for age discrimination and does not address Ellery's contentions.

DISCUSSION

The purpose of a demurrer is to raise issues of law from the facts stated in a pleading. (Isaac Cook v. Pablo de la Guerra et als. (sic) (1964) 24 Cal.237, 239.) In reviewing a judgment of dismissal following the sustaining of County's demurrer without leave to amend, we accept as true all of Ellery's allegations in her second amended complaint. (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197.)

County cites Truta v. Avis Rent A Car

System, Inc. (1987) 193 Cal.App. 3d 802 for its assertion that we should not liberally construe Ellery's pleadings, because with knowledge of the defects in her pleadings raised by County's demurrers, Ellery "failed to cure her defective pleading, [so that] all ambiguity or uncertainties must be resolved against" her. We disagree with County because whatever defects were raised by County's demurrer were so broadly based as to be insufficient to give Ellery notice of the defects in her complaint. Ignoring Ellery's request, the trial court failed to state reasons why it sustained County's demurrer to Ellery's initial complaint. Although Ellery's request for a statement of decision is only appropriate after a trial on the merits, Ellery's contention the trial court had a duty to specify what grounds

it found to sustain County's demurrer is correct.

Code of Civil Procedure section 472d requires a court sustaining a demurrer in any action or proceeding to include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based. A minute order stating, "Demurrer sustained; 10 days leave to amend" does not comply with the trial court's mandatory duty under this section. However, like many trial errors, a court's failure to comply with this section requires reversal only where there has been prejudice to the appealing party. Here, there is none because Ellery's complaints, liberally construed, failed to state a cause of action at any time upon which relief could be granted against the County.

In all three complaints Ellery sought

unemployment insurance benefits. The defendant who has sole authority over such relief is not County. It is the State of California. The CUIAB is a statutorily state-created agency, and Ellery's remedy was limited to seeking review from that body's decision by the superior court in a writ of mandate. See (Thomas v. California Emp. Stab. Com. (1952) 39 Cal 2d 501.)

Ellery's initial complaint should have been dismissed. Unfortunately, it was not. Ellery has now spent a great amount of time, effort and energy attempting to plead causes of action for relief which could not be granted from the defendant she sued or in the format she chose. Her belated attempt to plead some type of facts against County which would entitle her to damages is unavailing. Ellery cannot change the facts she pleaded three separate times. None of these facts

support a cause of action for age discrimination. The demurrer to her second amended complaint was properly sustained.

DISPOSITION

The judgment is affirmed. Parties to bear their own costs on appeal.

Signature
Justice Nares

We concur:
Signature
Acting Justice Huffman
Justice Froehlich

Supreme Court, U.S.
FILED
NOV 8 1991
OFFICE OF THE CLERK

(2)

No. 91-523

In The

Supreme Court of the United States

October Term, 1991

JULIET ELLERY,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeal of the State of California err in affirming the trial court's action in sustaining, without leave to amend, respondent's demurrer to petitioner's second amended complaint?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent County of San Diego ("County"),[1] a public entity and a political subdivision of the State of

[1] Respondent disputes petitioner Juliet Ellery's identification of the parties to the proceedings below. On the cover of her petition, petitioner incorrectly lists "County Counsel, County of San Diego" as respondent. The County itself, not County Counsel, is the real party in interest and respondent. Petitioner is a former probationary employee of respondent.

California, opposes the Petition for Writ of Certiorari on the following grounds: the petition fails to meet the jurisdictional requirements of this Court. It transgresses the formal requirements of accuracy, brevity and clarity, and it ranges far beyond the scope of review of issues considered and decided below. Therefore, the County respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner seeks restoration of unemployment benefits she claims she lost when the County terminated her probationary employment as an eligibility technician with the San Diego County Department of Social Services. The termination was based upon petitioner's refusal to sign an unconditional statement of understanding that she would comply with mandatory reporting statutes for child abuse and adult abuse.

As summarized in the Opinion of the Court of Appeal, State of California, Fourth Appellate District, Division One, upon her termination, petitioner applied for unemployment benefits, which were denied. (Petition Appendix, at 2-3.) Petitioner then appealed the denial to the California Unemployment Insurance Appeals Board ("CUIAB"). (*Id.* at 3.) Rather than seek judicial review of the CUIAB's decision by writ of mandate in superior court (*id.* at 12), petitioner filed a California Tort Claims Act claim against the County. (*Id.* at 3.)

Petitioner's original complaint sounded in tort, alleging both intentional and negligent interference with contract and

fraud. Three different superior court judges sustained demurrers against petitioner's successive attempts to plead a viable cause of action against the County. (*Id.* at 5-8.) On sustaining the second demurrer, the trial court granted petitioner leave to amend her cause of action for age discrimination only. (*Id.* at 7.) Because the facts failed to support a cause of action for age discrimination, the County successfully demurred to the second amended complaint. (*Id.* at 8.) An appeal[2], a petition for review[3], and this petition for certiorari followed.

---

[2] In response to the trial court's action sustaining without leave to amend the County's demurrer to petitioner's second amended complaint, petitioner raised the following issues in her brief to the Court of Appeal:

> A. The employer's illegal *acts* are immune for a time.
>
> B. The employer saves money by *breach* of his [*sic*] duties.
>
> C. Proximate *cause* of injuries is obscured.
>
> D. The employer has a better right to *due* process.
>
> E. Factors A through D are *unequal*. . . . An avalanche of process is not due process.

(Emphasis in original.) The Court of Appeal restated the issues raised as follows:

> Ellery asserts (1) three trial courts erred in sustaining demurrers to her complaints without reasons; (2) the trial court which denied her motion for

(Continued on following page)

REASONS FOR DENYING THE PETITION

I

THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 10 STANDARD OF PRESENTING SPECIAL OR IMPORTANT REASONS FOR REVIEW

The Petition for Writ of Certiorari fails to meet the standard of rule 10 of the Supreme Court Rules. That rule provides, in pertinent part:

(Continued from previous page)

> summary judgment and sanctioned her $425 failed to comply with Code of Civil Procedure section 437c because it did so 'without a rationale'; and (3) County prevailed before the CUIAB without giving Ellery a trial.

(Petitioner's Appendix at 8-9.) The Court of Appeal found that Ellery had failed to state a cause of action in any of the three complaints and that she had failed to seek review of the CUIAB decision in the proper manner. It found further that although petitioner's initial complaint should have been dismissed, the lack of a statement of the grounds for granting the demurrers did not prejudice petitioner. (*Id.* at 11-12.)

[3] In her petition for review to the California Supreme Court, petitioner stated as her issue: "Summary Judgment Deprives Ellery of a Due Process Tort Forum." In support, petitioner listed the following arguments:

> Deprival of rights occurred under color of state law.
> Ellery raised issues promptly and appeals timely.
> Conflicting statutes create errors in this case.
> A full tort forum is equitable and limited process is not.

The California Supreme Court denied review without comment. (Petitioner's Appendix, unnumbered first page.)

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. . . .

Petitioner alleges jurisdiction to review this case under rule 10.1(c), which provides that review may be proper when:

> [A] state court . . . has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Here, the sole legal question decided in the court below was whether, under state law, petitioner stated a claim upon which relief could be granted. Petitioner has not demonstrated that the Court of Appeal decided any federal question at all in this case, much less an important question of federal law that intrudes upon unsettled territory or conflicts with applicable decisions of this Court.

Petitioner lists five "substantial federal questions" and five subsidiary questions. Only the first question appears reasonably to have been raised below in both the Court of Appeal and the California Supreme Court. (*Compare* petition at i *with* nn.2 & 3.) Moreover, none of these questions addresses the grounds of dismissal of petitioner's successive complaints, the last from which she appealed. Here, of the five "substantial" questions identified, only questions one, four, and five raise any issues remotely cognizable in federal court. Questions two and three raise issues clearly limited to state law. Therefore, issues two through five, not having been properly raised

below, or touching only issues of state law, are inappropriately addressed to this Court. (*Cf. Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).)

Under the first question, petitioner vaguely alleges unconstitutionality of "state presumption statutes on evidence, jurisdiction and final judgment" as a violation of her civil rights under 42 United States Code section 1983. This issue could be summarized as follows: whether state judicial procedures unconstitutionally deprived petitioner of a trial on the merits concerning her various complaints against the County. Petitioner claims that application of California Evidence Code section 639, the presumption that a judgment correctly determines the rights of the parties, violated her due process. Petitioner's claim is really that state procedural requirements permitting demurrers and summary judgments kept her from having her day in court. But in order to state a cause of action for a constitutional violation under section 1983, petitioner must show that state legal process was insufficient to protect her procedural due process rights. (*Parratt v. Taylor*, 451 U.S. 527, 541-544, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) *cert. den.*, ___ U.S. ___, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990).) Here, petitioner fails in any understandable way to explain how state procedures have violated her civil rights and how state legal process was insufficient to protect her procedural due process rights. Therefore, petitioner has not presented an "important question of federal law" as required by rule 10.

Although not raised on appeal below, the fourth and fifth questions warrant brief comment. Under the fourth issue, petitioner claims her First Amendment right to free

speech was violated when the County terminated her during her probation for refusing to sign an unconditional statement of understanding in compliance with California child abuse and adult abuse reporting statutes. While petitioner couches this issue in the language of the First Amendment, she was but one among many County employees who were required to sign the same statements of understanding as a condition of their employment. Moreover, she fails to demonstrate how this employment requirement infringes her freedom of political expression. This Court has previously held that "a governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." (*Brown v. Glines*, 444 U.S. 348, 356 n.13, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980), *citing, inter alia, Cole v. Richardson*, 405 U.S. 676, 92 S.Ct. 1332, 31 L.Ed.2d 593 (1972).) Therefore, this issue is without merit.

The fifth issue raises an equal protection argument that the County treated petitioner differently than other County employees under an unspecified contract, implied to be a collective bargaining agreement, presumably applying to both petitioner and the County. Both of these latter issues would have been appropriate to address by writ of mandate for review of the September 27, 1988 decision of the CUIAB. (See petition Appendix, at 8, 12; *Thomas v. California Emp. Stab. Com.*, 39 Cal.2d 501, 247 P.2d 561 (1952).) Petitioner declined to pursue this remedy. Therefore, this issue is not properly before the Court.

The instant petition lacks any ground upon which this Honorable Court should grant review as provided by

rule 16. Therefore, petitioner has failed to satisfy rule 10, and the petition should be denied.

II

THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 14 STANDARD OF ACCURACY, BREVITY, AND CLARITY

The Petition for Writ of Certiorari does not meet the standard of Supreme Court rule 14. This rule provides, in paragraph .5:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Rule 14 requires a "short and concise" statement of questions presented. (Rule 14.1(a).) It requires a "concise statement" of the grounds of jurisdiction. (*Id.* at subpar. (e).) It requires a "*concise* statement" of the case (*id.* at subpar. (g), emphasis in original) and a "direct and concise" argument. (*Id.* at subpar. (j).)

Petitioner's diffuse, rambling petition exudes fundamental misunderstanding of the functions of government and the roles of administrative agencies and courts. The petition fails to state any federal question that was timely and properly raised so as to give this Court jurisdiction to review the judgment. Petitioner's statement of the case is neither concise nor limited to material facts. She has failed to present with accuracy, brevity and clarity those matters essential to an adequate understanding of the points of her petition.

Petitioner's failure to pursue her listed issues in the appropriate forum and her attempt to raise them now, out of the context of the Court of Appeal's action in this case, only add to the obscurity of her petition. Therefore, petitioner has failed to comply with rule 14.

III

THE COURT BELOW PROPERLY AFFIRMED THE TRIAL COURT'S EXERCISE OF ITS DISCRETION IN SUSTAINING THE DEMURRER WITHOUT LEAVE TO AMEND

Petitioner fails to conform her petition to the scope of the issues decided below. Rather, at each stage of the proceedings in this case, she has modified the issues to suit her personal interpretation of them. The trial court gave petitioner ample opportunity to amend her complaint to state a cause of action. When it became apparent that she could not, the trial court sustained the County's third demurrer without leave to amend.

Under California law, petitioner had the burden below of proving that either the demurrer was erroneously sustained or that the trial court abused its discretion in sustaining the demurrer without leave to amend. (*Stanson v. Brown*, 49 Cal.App.3d 812, 814, 122 Cal.Rptr. 862 (1975).) If she could not show a reasonable possibility that she could amend the complaint to state a cause of action, in what manner she could amend it, and how the amendment would change the legal effect of the pleadings, then the court did not abuse its discretion by refusing to permit further leave to amend. (*Goodman v.*

Kennedy, 18 Cal.3d 335, 349, 134 Cal.Rptr 375, 556 P.2d 737 (1976).)

In *Kennedy v. Bank of America*, 237 Cal.App.2d 637, 650, 47 Cal.Rptr. 154 (1965), the court stated:

> We . . . conclude that the court did not abuse its discretion in sustaining the demurrer without leave to amend because plaintiff had, in the first complaint and in the first amended complaint, attempted to state a cause of action without success. Three opportunities should suffice. [Citations omitted.]

Petitioner had multiple opportunities to support her claim of employment discrimination, but she failed to do so following two previously successful demurrers. In particular, the second amended complaint identified petitioner as belonging to a class protected by statute because of her age. However, the complaint completely failed to allege any facts to support a cause of action under either California or federal laws which protect that class. Furthermore, petitioner failed to allege any facts to support proof of discriminatory purpose or intent on the County's part against either her or the protected class.

The Age Discrimination in Employment Act (29 U.S.C. § 621, et seq.) prohibits employers from discriminating because of age against employees over age 40. California Government Code section 12941, subdivision (a), makes it unlawful practice to "refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote any individual over the age of 40 on the ground of age." But it does not make unlawful "termination of employment where the individual . . . employee failed to

meet bona fide requirements for the job or position . . . held . . . . " Petitioner's second amended complaint failed to allege sufficient facts to support an action for age discrimination.

Petitioner was a probationary employee whose County employment ended during probation because she refused to comply with a County work requirement. Petitioner failed to support her allegation of discrimination based on age with any salient facts. Moreover, she was unable to show any reasonable possibility that she would have been able to state a cause of action against respondent County. Thus, the Court of Appeal did not err when it affirmed the trial court's action in sustaining respondent's third demurrer without leave to amend, dismissing the case, and denying rehearing.

CONCLUSION

The Petition for Writ of Certiorari raises neither an important question of federal law nor identifies a decision by the Court of Appeal of the State of California on an issue of federal law not settled by this Court or in conflict with applicable decisions of this Court. For the

reasons discussed herein, respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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